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No. 85-857

In the Supreme Court of the United States

OCTOBER TERM, 1985

LOYD SIMMONS, II, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether joinder of unrelated charges of premeditated murder and aggravated assault for trial by court-martial is consistent with due process where the court-martial members were instructed specifically as to which evidence was relevant to which of the two charged offenses and the record establishes that the members followed the instructions.

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OPINIONS BELOW

The order of the United States Court of Military Appeals (Pet. App. 1a) is reported at 21 M.J. 38. The opinion of the United States Navy-Marine Corps Court of Military Review (Pet. App. 2a-7a) is unreported.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on September 20, 1985. The petition for a writ of certiorari was filed on November 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. I) 1259(3).

STATEMENT

Petitioner, a member of the United States Navy, was charged with premeditated murder and aggravated assault. He was convicted by a general court-martial convened by the Commanding General, Marine Corps Air Station,

Cherry Point, North Carolina, of the lesser included offenses of unpremeditated murder and assault consummated by a battery, in violation of Articles 118 and 128 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918 and 928. The court-martial members sentenced petitioner to a dishonorable discharge, confinement at hard labor for 20 years, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. 860, and approved the findings and sentence. The United States Navy-Marine Corps Court of Military Review affirmed the findings of guilty on the unpremeditated murder offense, but disapproved the findings of guilty on the battery offense and dismissed that offense (Pet. App. 2a-7a). Upon independent reassessment, the court found the original sentence appropriate for the remaining findings of guilty on the unpremeditated murder conviction (*id.* at 7a). Upon discretionary review pursuant to Article 67(b)(3), UCMJ, 10 U.S.C. 867(b)(3), the United States Court of Military Appeals affirmed without opinion (Pet. App. 1a).

1. On November 20, 1981, petitioner was involved in a fist-fight with Jafas Haynes. The incident was investigated informally, and on February 9, 1982—four days before petitioner fatally shot George Mayo—the convening authority referred a charge of aggravated assault by petitioner against Haynes to trial by special court-martial. On February 23, 1982, after learning that petitioner was suspected of murdering George Mayo, the convening authority withdrew the aggravated assault charge from the special court-martial because he felt obliged to refer all known charges to one forum (Tr. 6). Thereafter, the convening authority referred the murder and aggravated assault charges to a formal pre-trial investigation, pursuant to Article 132, UCMJ, 10 U.S.C. 932. Acting on the recommendation of the pre-trial investigating officer, the

convening authority then referred both charges to a general court-martial.[1]

At a pre-trial hearing, petitioner moved for severance of the murder and aggravated assault charges. The motion was denied. Tr. 12-13. Following presentation of the government's case in rebuttal, petitioner moved for a mistrial, alleging that character evidence introduced by the government in connection with the assault charge would be considered by the court-martial members on the murder charge. The trial judge denied the motion, concluding that a limiting instruction would be sufficient to prevent any prejudice to petitioner. Tr. 699, 734, 751.

2. With respect to the murder charge, the issue at trial was whether petitioner deliberately fired the pistol or whether it was discharged accidentally when the victim allegedly grabbed petitioner's wrist. Petitioner's only evidence on this issue was his own testimony. Petitioner testified that the pistol was discharged unintentionally when the victim pushed petitioner with one hand and grabbed petitioner's wrist with the other (Tr. 639-640). Petitioner's testimony was contradicted by his written confession, in which he stated that Mayo "shoved me in the chest with both hands. It was hard. My arms swung up and the pistol went off" (PX 11). In addition, an eyewitness to the shooting, a friend of petitioner's who observed the shooting from a very short distance, saw only petitioner's hand near the pistol as petitioner pointed the pistol at the victim and fired (Tr. 317-318). The eyewitness testified that the victim pushed petitioner on top of his shoulders with *both* hands, petitioner produced the pistol, pointed it, and fired (*ibid.*).

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[1]Nothing in the record even remotely suggests that the two offenses were joined by the convening authority in order to demonstrate general criminal propensity, to amass charges for prosecutorial convenience, or for any other improper purpose.

Finally, a firearms expert testified that accidental discharge by jarring would be highly improbable because of the half-cocked notch safety feature on the murder weapon (Tr. 503-504). Discharge of the weapon would require a steady force applied on the trigger (Tr. 504). The murder weapon had an 8-¼ pound trigger pull, a trigger pull considered to be heavy (Tr. 496-497). By comparison, the trigger pull on the .45 caliber military-issue pistol is about 5 to 6-½ pounds (Tr. 496).

Petitioner's defense with respect to the aggravated assault charge was self-defense (Tr. 610-612, 671-673). On rebuttal, the government produced two witnesses who testifed that petitioner had a reputation for violence at the naval hospital where he worked (Tr. 683, 689, 693).

ARGUMENT

The decision of the United States Court of Military Appeals is correct and involves only a narrow question of military procedure that has no impact outside of the military justice system. Petitioner acknowledges the fact that the military rule on joinder of offenses is different from the civilian rule contained in Fed. R. Crim. P. 8. But petitioner does not contend that the military rule was violated in this case; rather, his principal argument appears to be that the military *should*, as a matter of policy, employ a joinder rule that more closely approximates the civilian rule. In the absence of any claim that the military rule violates constitutional rights, however, petitioner's arguments are addressed to the wrong forum. As we demonstrate below, the Constitution entrusts to the President and Congress the authority to prescribe rules governing courts-martial. It is not open to the civilian courts to prescribe different rules simply on the basis of policy preferences. Accordingly, review by this Court is not warranted.

1. a. As petitioner notes (Pet. 8-9), military procedures in effect at the time of his court-martial provided that, with the exception of minor derelictions, all charges against an accused "ordinarily should be tried at a single trial by the lowest court that has power to adjudge an appropriate and adequate punishment." *Manual for Courts-Martial, United States—1969* ¶ 30*g* (rev. ed.). See also *id.* ¶¶ 26*c*, 33*h*.[2] This long-standing military preference for joinder of all known offenses at a single trial serves essential military purposes that have no counterpart in civilian society.[3]

The essential business of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). The aim of the peacetime military is to maintain its units honed to the razor's edge of preparedness through training exercises and simulations of combat conditions. An integral part of that preparedness is reliance on a military justice system that functions as effectively in times of war as in peacetime.

Courts-martial, while of critical importance to the maintenance of discipline, are a decidedly secondary function of the military. "To the extent that those responsible for performance of this primary [fighting] function are diverted

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[2]The current edition of the *Manual* contains an essentially similar provision. See *Manual for Courts-Martial, United States—1984*, Rule 601(e)(2), discussed at pages 7-8, *infra*.

The *Manual* is promulgated by the President pursuant to his constitutional authority as Commander-in-Chief of the Armed Forces (U.S. Const. Art. II, § 2) and pursuant to a statutory delegation of Congress's power to "make Rules for the Government and Regulation of the land and naval Forces" (U.S. Const. Art. I, § 8, Cl. 14). Article 36, UCMJ, 10 U.S.C. 836, delegates to the President authority to prescribe procedural and evidentiary rules governing trial by court-martial.

[3]The precise origins of the military joinder rule are unknown, but it existed long before the enactment of the UCMJ or the promulgation of the Federal Rules of Criminal Procedure. See App., *infra*, 6a-7a.

from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Quarles*, 350 U.S. at 17. The military joinder rule results in fewer courts-martial. Fewer courts-martial enhance military readiness by:

1. Minimizing diversion of servicemembers' time from their primary military assignments and their training;
2. Promoting unit integrity and cohesion by minimizing the occasions when servicemembers are absent from their units; and
3. Enhancing morale and discipline by providing prompt and visible remedies for crimes and breaches of discipline.[4]

In these circumstances, the President as Commander-in-Chief could rationally conclude that diversion of the additional resources necessary to conduct several trials in lieu of one is too high a price to pay in terms of lost military preparedness. Petitioner has not demonstrated the "extraordinarily weighty" considerations necessary to overcome this long-standing Presidential judgment. See *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976).

b. Petitioner nevertheless argues (Pet. 15) that the military joinder rule should be limited to "conditions of combat or extended deployment of operational units." Such a rule would be totally unworkable. Navy ships, for example, whether underway for routine training off the coasts of the United States or deployed to distant places,

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[4]This last function is particularly crucial in the naval services, where the offender and victim, often confined on a relatively small ship or living in a relatively small unit, must not only eat, sleep, and live closely together, but must also work together as part of a cohesive, combat-ready unit.

essentially operate no differently during peacetime than during times of war. Marine air-ground combat teams and Navy ships are deployed continuously to remote locations in regular, frequent cycles, interrupted only by brief intervals at a home base to re-equip, repair, and train for the next deployment. Piecemeal disposition of offenses obviously would interrupt the training and deployment cycles, thereby interfering with the combat readiness of the units and organizations involved.

Petitioner's assignment to an organization located ashore does not make the considerations noted above any less pertinent. Although the degree of disruption would be diminished, practicality dictates that court-martial procedures be uniform and consistent, because servicemembers are at all times subject to reassignment according to the needs of the military. The rules at issue must apply world-wide and under conditions reasonably foreseeable during war as well as during peace. See generally *Chappell* v. *Wallace,* 462 U.S. 296, 300 (1983).

c. The ABA Committee on Criminal Justice and the Military recently examined the advisability of replacing the current military joinder rule with a rule similar to Fed. R. Crim. P. 8(a), as did the drafters of the *Manual for Courts-Martial, United States—1984.* Both the ABA committee and the drafters of the revised *Manual* concluded that it would be impractical and ill-advised to adopt such a change in military procedure. As the drafters of the revised *Manual* explained (*Manual for Courts-Martial, United States—1984,* App. 21, at A21-28):

> This rule is inconsistent with Fed. R. Crim. P. 8(a), which requires (in general) separate trials for each offense. Such a requirement is too unwieldy to be effective, particularly in combat or deployment. Joinder

is entirely within the discretion of the convening authority.[5]

This recent reaffirmation of the need for the military joinder rule makes judicial deference to the President's judgment as Commander-in-Chief all the more imperative. As this Court has recognized, civilian judges are ill-equipped to determine the impact upon military effectiveness of any particular intrusion upon military authority. See, *e.g.*, *Chappell* v. *Wallace*, 462 U.S. at 301; *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973); *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953). Particularly in the absence of any colorable claim of a constitutional violation (see pages 8-9, *infra*), the President's decision to maintain the military joinder rule is not a matter requiring civilian judicial scrutiny.[6]

2. a. Misjoinder does not, in any event, constitute a per se violation of due process even in the civilian sector. See, *e.g.*, *Robinson* v. *Wyrick*, 735 F.2d 1091, 1094 (8th Cir. 1984); *Corbett* v. *Bordenkircher*, 615 F.2d 722, 724-726 (6th Cir. 1980). Indeed, "no federal court has raised misjoinder to an error of constitutional dimension." Note, *Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion*, 6

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[5]The extensive analysis of the ABA committee, which reached the same conclusion, is reproduced at App., *infra*, 1a-9a.

[6]Even if misjoinder were an error of constitutional dimension in the civilian sector, the same rule would not necessarily obtain in the military. As this Court has often recognized, many of the constitutional rights enjoyed in the civilian community cannot be accommodated in our system of military justice absent congressional direction to that end. See, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 746, 757-760 (1975); *Parker* v. *Levy*, 417 U.S. 733, 743-752 (1974); *O'Callahan* v. *Parker*, 395 U.S. 258, 261-264 (1969). For the reasons previously discussed, the civilian rule on joinder of offenses is incompatible with the needs of the military.

Hofstra L. Rev. 533, 540 (1978) (footnote omitted). See, *e.g., United States* v. *Seidel,* 620 F.2d 1006, 1013 (4th Cir. 1980) (misjoinder only "a violation of a mere procedural rule") (footnote omitted). The Court's discussion of the harmless error standard for nonconstitutional violations in *Kotteakos* v. *United States,* 328 U.S. 750 (1946), further suggests that improper joinder does not, in itself, violate the Constitution. Finally, there is of course no constitutional provision addressing joinder. If misjoinder is ever unconstitutional in a particular case, therefore, it could only be because the ensuing prejudice is so great as to deny a defendant a fair trial in contravention of the Fifth Amendment. But where no prejudice has arisen, no constitutional violation could possibly have occurred.

b. In the instant case, petitioner's only claim of prejudice is that the evidence admitted with respect to the assault charge tended to show petitioner's propensity for violence, thereby possibly inducing the members to reject his defense to the murder charge. See Pet. 9-10. On the facts of this case, petitioner's argument does not rise to the level of actual prejudice sufficient to constitute a denial of due process. The military judge instructed the members to consider each offense, and the evidence presented for each offense, separately and independently (Tr. 734):

> [Military Judge]: It has been emphasized earlier and I emphasize again, that Charge I and Charge II are completely separate. To emphasize this point, I will completely instruct you on the law regarding Charge I first, then I will instruct you on the law regarding Charge II. You are instructed to treat these two alleged incidences [*sic*] as completely independent and separate.

The military judge repeated this cautionary instruction even more explicitly by instructing the members to disregard the

government's rebuttal evidence, offered to refute petitioner's claim of self-defense on the assault charge, when they considered the murder charge (Tr. 751):

> [T]his is important, in this regard, you must completely disregard the testimony of Lieutenant Commander Nolan and Lieutenant Selak concerning the accused's reputation for peacefulness or unpeacefulness. This evidence was admitted only as to Charge II and the alleged incident on 20 November 81, for its tendency, if any, to show the accused's character at work at the Naval Hospital in that limited community, not in the community at large.
>
> In connection with Charge I, the alleged incident charged on 13 February, the shooting incident, you must not consider this evidence for any purpose. You must not infer from such evidence that the accused on this occasion had a violent disposition or any criminal propensity and that he, therefore, was the aggressor on the 13th of February or committed any offense alleged or included in Charge I.

There is no reason to believe that the members were unable or unwilling to obey the instructions. To the contrary, the military judge's instructions were clear, and the members must be presumed to have understood them and followed them. Moreover, the assumption that limiting instructions are followed has special force in the context of military trials. Court-martial members are selected, as required by Article 25(d)(2), UCMJ, 10 U.S.C. 825(d)(2), on the basis of their age, education, training, experience, length of service, and judicial temperment. Here, the members were active and conscientious participants in the trial. They took notes throughout the trial (see Tr. 200), asked the witnesses more than 30 questions (Appellate Exhs.

XXVII-XXXVII, XXXIX-XLVII) and specifically asked the trial judge numerous questions about the instructions in a sincere effort to understand what was required of them (see, *e.g.*, Tr. 737, 741, 742, 743, 745, 748, 750, 752, 753, 758). The conduct of the members permits no conclusion other than that they scrupulously followed all instructions. In these circumstances, petitioner's speculative assertion that the instructions were "fruitless" (Pet. 10) is contradicted by the clear evidence of record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

COMPARATIVE ANALYSIS

FEDERAL RULES OF CRIMINAL PROCEDURE AND MILITARY PRACTICE AND PROCEDURE

Prepared by the

Committee on Criminal Justice and the Military,
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INTRODUCTION

The purpose of this Comparative Analysis is to provide to practioners of military justice some insight on how the Federal Rules of Criminal Procedure may be utilized in the court-martial process. Art. 36, Uniform Code of Military Justice (UCMJ) (10 U.S.C. § 836) provides that the procedure, including modes of proof, in cases before courts-martial may be prescribed by the President and shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with the UCMJ. The U.S. Court of Military Appeals has held that ". . . Federal practice applies to courts-martial procedures if not incompatible with military law or with the special requirements of the military establishment." *United States v. Knudson,* 4 USCMA 587, 16 CMR 161, 164 (1954); *Chenoweth v. Van Arsdall,* 22 USCMA 183, 46 CMR 194 (1972); *United States v. Fisher,* 4 USCMA 152, 15 CMR 152 (1954).

However, to our knowledge, there has never been a study conducted to determine which federal rules are consistent with the UCMJ or MCM and therefore able to be used in court-martial procedure. This Comparative Analysis is such a study, and we hope will be the first step towards an increased awareness by practitioners of the authority, practicality and applicability of the federal rules in courts-martial. For example, Rule 17.1, Pretrial Conference, offers a procedure not contained in the MCM or UCMJ, yet

one which has been used by several military judges resulting in a greatly increased efficiency in the administration of justice. Other rules may be similarly used, resulting in a greater amount of flexibility in the court-martial process. We hope that this Comparative Analysis becomes a handy deskbook for practitioners and that they will use it and the Federal Rules of Criminal Procedure to expand and improve procedures before courts-martial.

Although the Committee on Criminal Justice and the Military of the ABA Criminal Justice Section initiated this study only with the above goals in mind, it comes at a propitious time. There is presently a project ongoing within the Department of Defense to revise the entire Manual for Courts-Martial. One of the goals of this project is to align MCM procedures more with the Federal Rules of Criminal Procedure. We hope that the Comparative Analysis is of some aid to this ambitious project. Following the Manual revision, it may prove of even greater value to practitioners.

We appreciate the support of the Criminal Justice Section, American Bar Association, which sponsors our committee and which graciously funded the printing of this treatise. Last, but not least, we appreciate the amount and quality of work on this project contributed by our fellow committee members listed herein, without whom this Comparative Analysis would not exist. These committee members are all busy lawyers or judges who have generously contributed their own time to this work.

It is our hope that this Comparative Analysis will, through the initiative and imagination of those who use it, contribute to the improvement of our system of justice.

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[18] Rule 8. Joinder of Offenses and of Defendants.

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offense charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

COMMENTARY

Rule 8(a) implicitly forbids joining offenses in the same indictment or information *unless* they are related by character, act, transaction, common scheme, or plan. Fed. R. Crim. P. 8(a). L. Orfield, *Criminal Procedure Under the Federal Rules, §* 8:19 (1966) (*Orfield*). Even when related, there is no *requirement* that any counts be joined. *Orfield* at 765. Even when major and minor offenses are related, the jury should be properly instructed. *Orfield §* 8:50.

The reason for the federal rule is a concern that the accused will be prejudiced by joinder of unrelated, serious offenses. *See e.g., Orfield, §§* 8:15 - 8:25; Fed. R. Crim. P. 14; *Cf. United States v. Lewis,* 626 F.2d 940 (D.C. Cir. 1980). For example, even where there is a related joinder there is concern that: the defense might become embarrassed or confounded in presenting separate defenses; that the jury might use evidence of one of the crimes charged to infer commission of another; and that the jury might accumulate evidence of various crimes charged to find the accused guilty on a count which, if considered separately, it would not so find. *United States v. Lewis, supra.*

[19] On the other hand, in the military justice system any number of diverse charges ordinarly *should be* joined (except that major and minor charges should *not* be joined). Paras. 27*c*, 30*g*, and 33*h*, MCM 1969 (Rev.).

This historical variation existed long before the UCMJ or Federal Rules of Criminal Procedure. *Orfield* at § 8:19; W. Winthrop, *Military Law and Precedents*, 152 (2d ed. 1920) (*Winthrop*); *Naval Courts and Boards*, § 20, (1937). The military has long recognized this divergence. *Winthrop*, at 152, notes:

> Unlike the ordinary criminal procedure, where but one indictment, setting forth (in one or more counts) a single offense or connected criminal transaction, is in general brought to trial at one time, the military usage and procedure permit of an indefinite number of offences being charged and adjudicated together in one and the same proceeding.

The *Legal and Legislative Basis, Manual for Courts-Martial, United States*, 41 (1951) specifically commented on the difference between the federal rule and the military rule, and stated:

> What is desired in court-martial practice is the application of a reasonable rule.

The effect of joinder is different in the two systems. Under the federal system, a separate conviction and sentence may be had on each count. *Orfield* § 8:49. Courts-martial, however, adjudge "the *aggregate* of the limit of punishment for each separate and distinct offense." (Emphasis supplied). Para 127*c*, MCM, 1969 (Rev). *United States v. Keith*, 1 USCMA 442, 448-49, 4 CMR 34, 40-41 (1952); *United States v. Gutierrez*, 11 MJ 122 (CMA 1981).

There are many reasons why it is impracticable for Rule 8(a) to be adopted by the military justice system.

Courts-martial are courts whose jurisdiction is limited to certain defined individuals. Art. 2, UCMJ. If a service member is tried for one offense and awarded a bad conduct discharge, another trial would often be impractical but may

be necessary because of the seriousness of the offense. Under such circumstances, personnel and physical assets often will have to be doubled to arrive at a second conviction. *Contra,* C. Wright, *Federal Practice and Procedure,* § 143 (1969) (*Wright*). Further, the trial would be delayed—and, because the military justice system tries cases worldwide and transfers individuals frequently and on short notice, witnesses, counsel, and the accused will often not be available for a second trial. If [20] sentenced to confinement, the accused may not be serving confinement at the place of trial. To transfer such individuals back to the original trial situs would be disruptive to the efficient and effective disposition of cases and place unwarranted burdens upon commands (including those at the appellate level). Further, situations such as rapid deployment, unit movement, etc. may mean that it may be impossible to try the accused again. *See United States v. Keith, supra,* at 40; *United States v. Taylor,* 28 CMR 752 (ABR 1959). In any event, returning serious offenders to the situs of their original trial can often be extremely deleterious to high morale, good order, and discipline in the command.

The accused in the military justice system benefits from the joinder of offenses. *See United States v. Taylor, supra,* at 756. In most cases, the maximum punishment is limited by the jurisdiction of the court-martial while the actual punishment possible for the offenses is much greater. Arts. 19, 20, UCMJ. *See also United States v. Wahl,* 5 CMR 733, 737 (AFBR 1952). Even in the general court-martial, joinder of all known offenses can preclude a prior conviction that may aggravate or accelerate the maximum punishment. Paras. 75, 127, MCM, 1969 (Rev.). Further, it is more likely the sentences from one court-martial will be *less* than the aggregate sentence of two courts-martial. *United States v. Taylor, supra,* at 756. In general courts-martial, the Article 32 Investigation is a more effective vehicle to

weed out charges which should *not* be tried than the federal indictment. *See Moyer, Procedural Rights of the Military Accused,* 22 Maine L. Rev. 109-14 (1970). When groundless specifications do create prejudice, reversal will result. *United States v. Aronson,* 25 CMR 653 (ACM 1958).

The federal judicial system has recognized the desirability of "compelling the government to join all the charges it has against a single defendant. . ." *See Wright, supra,* at 313. The policy of the Department of Justice is to consolidate as many offenses as possible at a single trial. It is "a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement." *See Petite v. United States,* 361 U.S. 529, 531-32 (1960). Tentative draft No. 5 of the Model Penal Code of the American Law Institute recommends an increased joinder of offenses. However, liberal procedures for amendments to indictments would be required and federal indictments cannot be amended. *Orfield, Joinder in Federal Criminal Procedure,* 26 F.R.D. 23, 76-77 (1960); *Wright, supra, §* 143.

Consequently, not only would it be impracticable to incorporate Rule 8(a) into military procedure, but the military has the more desirable, modern practice.